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No. 367

IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

UTAH PIE COMPANY, *Petitioner*,

v.

CONTINENTAL BAKING COMPANY, CARNATION COMPANY, and PET MILK COMPANY, *Respondents*.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

BRIEF IN OPPOSITION

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BRIEF IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals for the Tenth Circuit of which review is sought appears at 1968 CCH Trade Cas. ¶ 72,443. It also appears as Appendix A to the Petition and is cited "Petition, App. A, p. —" in this Brief in Opposition.

STATUTES INVOLVED

Sections 2(a), 4 and 16 of the amended Clayton Act, 15 U.S.C. §§ 13(a), 15 and 26 (1964), are the only statutory provisions involved. They are printed in Appendix B of the Petition.

QUESTIONS PRESENTED

1. Whether the Court of Appeals erred in holding that the evidence purporting to establish petitioner's damages was without foundation and was so wholly unrelated to Continental's one actionable price reduction as to be insufficient to sustain the trial court's judgment.

2. Whether the Court of Appeals erred in establishing a general framework for the ordering of the proof in a second trial, and in requiring petitioner to relate its damage claim against Continental to Continental's June-July 1961 price reduction.

STATEMENT OF THE CASE

This case was initially tried to a jury before the United States District Court for the District of Utah, the Honorable Willis W. Ritter, Chief Judge, presiding. The trial resulted in jury verdicts in favor of the plaintiff-petitioner on claims that each of the three defendants, respondents here, had violated Section 2(a) of the amended Clayton Act, and against petitioner on its charge that the three defendants had conspired against it in violation of Section 1 of the Sherman Act. The trial court directed the entry of judgments in accordance with the verdicts. Defendants' motions for directed verdicts, for judgments n.o.v., and alternatively for a new trial were all denied, and no opinions, written or oral, were delivered by the district court in support of its rulings.

In support of its posttrial motions Continental specifically raised the petitioner's failure of proof on the damage issue, and renewed its earlier objections to the erroneous admission into evidence of the plaintiff's principal damage exhibits. (R. 1416-20).

When this case was initially before the Court of Appeals Continental urged numerous grounds for reversal, including these same matters having to do with proof of damage. In its first opinion the Court of Appeals found it unnecessary to deal with these contentions in light of its finding that the evidence failed to establish a prima facie violation of Section 2(a) of the Clayton Act. *Continental Baking Co., et al.* v. *Utah Pie Co.*, 349 F.2d 122, 126 (10th Cir. 1965). On certiorari, this Court reversed, holding that under the Clayton Act's incipiency standards there was sufficient evidence upon which a jury was entitled to find a violation by reason of Continental's promotional price reduction in the Salt Lake City market during June-July 1961, even if the actual impact upon Utah Pie was "negligible." *Utah Pie Co.* v. *Continental Baking Co., et al.*, 386 U.S. 685, 699-700. In remanding for further proceedings, this Court intimated no views on the other grounds for reversal that had been presented to the Court of Appeals. Id. at 704.

Following the remand, supplemental briefs were filed by all parties and additional oral argument was heard by the Court of Appeals. In a second opinion the Court of Appeals concluded that in view of this Court's holding that the evidence was sufficient to sustain a finding of a Section 2(a) violation, it could not say as a matter of law that petitioner had suffered no damage as a result of Continental's June-July 1961

pricing effort. Petition, App. A, p. 48.[1] The court held, however, that petitioner's damage exhibit purporting to show enormous losses (over a three-year period) attributable to Continental was patently unrelated to Continental's one price reduction and wholly lacking in probative value and necessary evidentiary foundation.

The court again declined to pass upon the other grounds for reversal that had been urged by Continental,[2] and instead remanded for a new trial, asserting its belief that the district court would conduct the trial in accordance with the views expressed by this Court and by the Court of Appeals. In order to assure, however, that the same confusion and prejudice that arose on the first trial by reason of the number of separate claims would not again vitiate the proceedings,[3] the

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[1] This is not to say, however, that the Court of Appeals concurred in petitioner's assertion that the mere lowering of petitioner's price in June-July 1961 makes out a prima facie case of injurious impact. As a result of its lower price, petitioner not only enjoyed record sales volume but succeeded in shutting Continental out of the market. All of this expanded volume was sold at a profit. R. 830-31. Simple arithmetic therefore destroys the contention at page 15 of the Petition that petitioner's lower price by itself establishes a loss of profits.

[2] *E.g.*, that the trial court had erroneously admitted against Continental certain highly inflammatory and damaging testimony concerning a dispute between Gaylen Rigby and the man who subsequently became Continental's broker; and that the trial court through its instructions to the jury had utterly obliterated Continental's "meeting competition" defense.

[3] When this case was first before the Court of Appeals, that court set aside the jury's verdict on Continental's counterclaim based upon petitioner's consistent local price discriminations favoring the large chain purchasers, and remanded for a new trial on the ground of possible jury confusion arising out of the multiplicity of claims and the manner in which the evidence had been presented. 349 F.2d at 156-57. The new trial ruling on Continental's counterclaim was accepted by both sides, and this second trial is now pending the outcome of the Petition for Writ of Certiorari.

court laid down guidelines for the ordering of proof. Responding in part to respondents' pleas for separate trials in the event of a new trial, the court directed that petitioner offer separately against each defendant the evidence relied upon to establish violation, injury and damage claimed against each, and that each defendant be allowed to put on its defense in direct response to the plaintiff's evidence relating to it.

ARGUMENT

I

Petitioner's effort to interest this Court again in the case against Continental by attributing to the Court of Appeals a perverse insistence upon an erroneous view of the facts does not withstand even cursory analysis. The Court of Appeals' view of the facts relevant to petitioner's claim against Continental is entirely consistent with the facts as laid out in this Court's opinion. 386 U.S. at 698-700.[4]

As this Court accurately noted, "[p]etitioner's case against Continental is not complicated." 386 U.S. at 698. During 1958, 1959 and most of 1960 Continental was for all practical purposes out of the Salt Lake City market. *Ibid.* Starting late in 1960 and up to June 1961 Continental engaged, through a broker in Salt Lake City, in "not spectacularly successful" sales efforts in an attempt to reenter the market. *Ibid.* The conclusion of this Court and of the Court of Appeals

[4] The oddly severe attack upon the Court of Appeals contained in the Petition is especially perplexing in light of counsel's statements during oral argument before this Court. The Court will recall that in response to questions by Mr. Justice Black, counsel for all parties agreed that in its prior opinion the Court of Appeals had accurately stated the facts, although counsel reserved the right to dispute certain inferences drawn from those facts.

that Continental's offer of $2.85 per dozen in June-July 1961 was "the heart of petitioner's complaint" against Continental, *ibid.*, is consistent with petitioner's admission that never prior to that time had Utah Pie reduced its price because of a price offered by Continental. Petition, App. A, p. 46, n. 16.

The Petition fails to document its flamboyant charges against the Court of Appeals with citations to instances where that court reached conclusions inconsistent with the facts stated in this Court's opinion relating to Continental. At pages 9 and 10 of the Petition there is set out in edited form a portion of this Court's opinion concerning Continental. The editing suggests that petitioner desires to imply a finding by this Court that Utah Pie suffered a loss of profits as a result of Continental's $2.85 price in the Salt Lake City market in June-July 1961. As is plain from a reading of the unedited text, 386 U.S. at 699-700, this passage was directed to the issue of violation and not to the issue of damage. Indeed, the full text makes it apparent that this Court believed a finding against Continental on the issue of violation might rest upon the possible effects of Continental's and Utah Pie's contemporaneous prices on some third seller, or on the possibility that Utah Pie might have suffered some loss had Continental continued [as it did not] to charge its $2.85 price and had Utah Pie [as it did not] failed to respond to Continental's pricing effort.

Whether there is sufficient probative evidence to support a finding that between June and September 1961 petitioner suffered a loss of sales or profits stemming from Continental's pricing is a question different from that of violation, and one upon which this Court did not pass. Indeed, there is no evidence in the record upon which a court could hold that Utah Pie's in-

creased sales, all at a profit, at its lower price resulted in any loss of profits. This issue was plainly one of the issues comprehended in the Court's statement that it was not "intimating any views on the other grounds [for reversal] presented to the Court of Appeals." 386 U.S. at 704.

We respectfully submit that aside from the groundless charge that the Court of Appeals has flouted the prior decision of this Court, the errors claimed in the petition as to Continental are not such as to merit further review. The case against Continental now contains no issue of general importance. It is not correct to claim, as does the Petition at pages 30-32, that the decision below is in conflict with those of other circuits as to proof of damage. The Tenth Circuit has neither ruled out damage evidence by competent opinion testimony based upon facts of record, nor has it required "mathematical certainty." The court applied the standard rule of law that damages may be proved with only reasonable certainty by competent evidence. It cited as a guide for the new trial *Atlas Bldg. Prods. Co.* v. *Diamond Block & Gravel Co.*, 269 F.2d 950 (10th Cir. 1959), *cert. denied*, 363 U.S. 843, a case in which the Tenth Circuit itself upheld a judgment based upon interested opinion evidence approximating damages. The Court of Appeals found, simply, that in light of the facts of this record, plaintiff's principal damage exhibit lacked adequate foundation and that its admission into evidence was both erroneous and prejudicial. Nothing in the decisions of other circuits in any way conflicts with this limited holding.

Petitioner's plea is simply that this Court review the evidence and sift out the merits of the Court of Appeals' conclusions respecting the adequacy of the

damage exhibit. To this question we now turn, though in the belief that no issue warranting further review is presented therein.

II

In reviewing petitioner's damage evidence to determine if it was properly admitted and whether it met the modest requirements that have been established for the sufficiency of such proof, the Court of Appeals was performing only the usual task that courts of appeals are called upon to perform daily. *See, e.g., Herman Schwabe Inc.* v. *United Shoe Machinery Corp.*, 297 F.2d 906 (2d Cir. 1962), *cert. denied*, 363 U.S. 811; *Sunkist Growers, Inc.* v. *Winckler & Smith Citrus Prods. Co.*, 284 F.2d 1 (9th Cir. 1960), *rev'd on other grounds*, 370 U.S. 19.[5]

The Court of Appeals' analysis discloses gross defects in the damage evidence, and numerous fundamental underlying assumptions that were unsupported by and, more often than not, contradicted by the undisputed facts of record. Significantly, petitioner has not attempted to show that the Court of Appeals' analysis was faulty, or that the damage evidence can in fact be

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[5] Petitioner's assertion (Petition, pp. 27-29) that the Court of Appeals erred because inadequate objections to petitioner's damage evidence were registered in the trial court is wholly lacking in substance. Objections were made and they fairly encompassed the grounds ultimately relied upon by the Court of Appeals, *e.g.*, R. 564-65, 567, 578-79, 580, 583-84, and 585.

If the trial court failed to understand fully the grounds for these objections, the failure is attributable to the court's disinclination to permit meaningful voir dire or cross-examination of petitioner's damage witness. Indeed, the trial court at times evidenced a perplexing hostility toward respondents' efforts to probe the weaknesses in petitioner's damage evidence. *E.g.*, R. 566, 567, 572, 591, 592, 597-98, 874-76.

rationalized on the basis of the record facts. Rather, petitioner's contention appears to be that the flaws in its proof were not of sufficient consequence to warrant setting aside the judgment and ordering a new trial. In fact, however, the Court of Appeals' analysis shows that petitioner's damage evidence was so wholly indefensible in so many central respects, and so plainly prejudicial that it would be grossly unjust to permit the trial court's judgment against Continental to stand.

Petitioner's main damage exhibit was Pl. Ex. 95, which appears at R. 4591. This exhibit was supported by Pl. Exs. 96-101 (R. 4592-4607) which simply display the arithmetical computations used in developing the figures on Pl. Ex. 95. This exhibit which appears clearly to have entered into the jury's consideration of the damage question,[6] purported to measure peti-

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[6] Petitioner accuses the Court of Appeals of attempting to "psychoanalyze" the jury because of the court's observations concerning the amount of the verdicts coinciding with figures appearing on the exhibit in question. The charge is an unfair one. Unless the rule of harmless error is to be abandoned and reversals for trial court error are to become automatic, a reviewing court must be free to consider all of the facts of record including the amount of the verdict, in order to determine whether trial court error appears to have been prejudicial. *Compare*, Schaffer v. Universal Rundle Corp., 1968 CCH Trade Cas. ¶ 72,505 (5th Cir. 1968).

Petitioner's similar claim (Petition, pp. 24-25) that the Court of Appeals took over the jury's function of determining causation does not apply to the Continental case. The quotations relied upon do not relate to petitioner's claim against Continental for lost sales and profits in the summer of 1961. The Court of Appeals has not denied the jury's right to find that Continental's $2.85 price to the limited customers it could serve "caused" petitioner to reduce to $2.75 its price on its larger pies to all customers for substantially longer periods of time, or that it "caused" petitioner to lose rather than gain sales.

tioner's losses according to an accounting formula entirely unrelated to the facts of petitioner's case against Continental. Thus the formula yielded supposed damages based on sales purportedly lost by petitioner to Continental as a result of price discriminations throughout 1959 and 1960 when Continental was for practical purposes out of the market and when no discrimination in its prices existed. See Pl. Ex. 96. The formula also purported to calculate damage on the plainly false assumption that petitioner's own dominant position in private label during the later years was not a factor to be taken into account in evaluating the causes of its lower sales of "Utah" label. This unfounded assumption necessarily underlay a substantial portion of the claim against Continental for lost sales in the Salt Lake City market, and yet it was not only contradicted by the record of actual sales, as noted by the Court of Appeals, but was contradicted by petitioner's own damage witness who repeatedly testified that private and proprietary brands were fully competitive in the market. R. 815, 872. *See also* R. 596-98.

Petitioner claims error in that the Court of Appeals failed to consider the portion of its damage exhibit purporting to measure a loss of profits by reason of reduced prices charged in response to Continental. Petition, pp. 14-15. But here again, the formula underlying Pl. Ex. 95 results in purported losses to Continental because of reduced prices throughout an entire two-and-a-half year period. This, too, is in complete contradiction of the testimony of petitioner's damage witness that he never reduced a price in response to Continental prior to June 1961. Pl. Exs. 95 and 101, R. 4591, 4606; Petition, App. A, p. 46, n. 16. And the *minimum* price upon which petitioner's

exhibits computed such alleged losses was $3.70 per dozen, although, as this Court has noted, at the time of Continental's attempted reentry into the Salt Lake City market, petitioner's going price for its Utah label was $3.40 while its discriminatory private label sales were at $3.10. 386 U.S. at 698.

Similarly, the "goodwill" figure relied upon by petitioner to support the judgment had no connection to the case against Continental, except in the now dead conspiracy claim. The $25,000 arbitrarily allocated to Continental by the witness on the instructions of petitioner's counsel did not even purport to relate to the June-July $2.85 promotion. There is no evidence anywhere that petitioner lost any goodwill at all because of Continental's June 1961 price.

Petitioner's case against Continental is not one in which proof of damages in a reasonably approximate amount presents unusual difficulties. *Compare Bigelow* v. *RKO Radio Pictures, Inc.*, 327 U.S. 251. If petitioner was damaged by Continental it was damaged because it earned less money in and around June-July 1961 by reason of lost sales, lower price, or both. Such loss of profits, if any,[7] as may have occurred can never be proven with absolute certainty; but certainty is not required under the decision of the Court of Appeals. All that the court has required is that petitioner come forward with *some* probative evidence that relates to the one claim of violation against Continental and from

[7] Even petitioner concedes that "If Utah Pie had cut price and thereby *gained* market share, it might be argued that impact was not proven." Appellee's Supplemental Brief on Remand, p. 35. The truth is that impact is not necessarily proven even if market share declines, so long as increased volume results from the lower price, as it did here.

which a reasonable approximation of damages, if any, can be drawn. That such evidence might at best yield figures in the hundreds rather than the hundreds of thousands of dollars may in a sense explain the lack of such evidence in the present record, but it does not justify it.

Petitioner also argues vaguely that the Court of Appeals erred in not considering as adequate proof of damage certain other evidence that can be culled from the record consisting chiefly of raw data concerning prices, costs and sales volume, and occasional, isolated expressions of opinion on a variety of matters. Petition, pp. 17-19. But such evidence, standing alone, would not support a jury determination of damages against Continental in any reasonably approximate amount related to the alleged violation. Nor, of course, is this the evidence upon which petitioner relied in arguing the computation of damages to the jury. Confronted with a similar argument, the Court of Appeals for the Second Circuit, in the *Schwabe* case, *supra*, observed that a judge with days in which to study the exhibits might come up with some rational computation of damages on a theory wholly different from that advocated by the plaintiff's damage witness, but that it would be foolhardy to expect a jury to do so. 297 F.2d at 912, n. 7. This reasoning from a case upon which petitioner places substantial reliance is equally applicable here.

Petitioner's entire damage case to the jury was built upon its Exhibit 95 (in its original form a chart several feet in size). Even if the amounts of the verdicts did not match the numbers on this exhibit, it would have to be assumed that the exhibit, emphasized as it was during the trial and in closing argument, *e.g.*, R. 574-78,

1265, 1272-80, would have had an important impact upon the jury's deliberations. This being so, the Court of Appeals' holding that justice requires a new trial is plainly correct.

III

In remanding the case to the district court for a new trial the Court of Appeals directed that petitioner, after introducing its evidence of general applicability, proceed with its case against one of the three defendants and that that defendant then present its defense, before evidence relating to petitioner's claims against the remaining defendants is received. In so ordering the proof the Court of Appeals was acting well within the scope of authority granted to it by Section 2106 of the Judicial Code. That section empowers the courts of appeals to set aside trial court judgments and, on remand, to "require such further proceedings to be had as may be just under the circumstances." 28 U.S.C. § 2106 (1964).

The Court of Appeals had previously found in setting aside the verdict against petitioner on Continental's counterclaim that the number of claims combined with the manner in which evidence was allowed to be introduced during the first trial had rendered the jury's task a difficult if not an impossible one. 349 F.2d at 156-57. The court also found that petitioner, while purporting to allocate its supposed losses in a detailed and impressively "expert" manner, had in fact put forward exhibits that, like those in the *Schwabe* case, *supra*, contained

> "an array of figures conveying a delusive impression of exactness in an area where a jury's common sense is less available than usual to protect it." 297 F.2d at 912.

In setting down the procedure to be followed at the new trial to avoid a repetition of confusion and prejudice the Court of Appeals plainly acted within the bounds of discretion permissible under Section 2106, and indeed petitioner appears not to contend otherwise.

Petitioner does contend, at pages 32 to 34 of its Petition, that along with laying down the general framework for the ordering of the proof in the second trial, the Court of Appeals imposed an improper substantive burden of proof upon petitioner to establish with particularity the damages allegedly caused by each of the defendants. This contention rests upon an apparent misconception of what the court did.

The Court of Appeals did not hold, as petitioner suggests, that as a general matter petitioner must establish with any specified degree of certainty that one defendant rather than another proximately caused any particular loss. Whether and to what extent petitioner should now be required to pinpoint its alleged losses as flowing from the acts of one rather than another of the defendants must largely depend upon the evidence adduced, and the burden may well vary, depending upon the proof, from one defendant to the other. Even the Restatement rule relied on by petitioner (Petition, pp. 32-33) could be applied consistent with the Court of Appeals' mandate, although such an application of the rule appears unprecedented.[8]

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[8] This rule, set forth in Restatement, Torts § 433 b(2), would place the burden of allocating damages upon concurrent wrongdoers where their tortious conduct "has combined to bring about harm to the plaintiff." Petitioner points to no instance where the rule has been applied in a case like the present one, and our research has disclosed none. What does appear from the cases from which the pertinent Restatement illustrations are drawn is that application of the rule has so far been limited to situations

Had the Court of Appeals granted the defendants' prayers for wholly separate trials, petitioner would of course have been required to prove its damages on each trial, each time bringing home its damage claim as best it could to the defendant involved. Instead of granting wholly separate trials the lower court has attempted to steer a middle course. The requirement that petitioner offer proof of violation, injury and damage separately as to each defendant merely reflects the procedure that the Court of Appeals found desirable to permit the jury rationally to parse out the merits of what are, in fact, four separate antitrust cases. It does not determine petitioner's substantive burden of proof.[9]

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where an injury is "indivisible" and "it is impossible to determine" the proportion each defendant has contributed. Phillips Petroleum Co. v. Hardee, 189 F.2d 205 (5th Cir. 1951). See generally, cases cited at Restatement, Torts 2d (Appendix) 144 (1966). Such cases commonly involve chain collisions, flooding of land by water from two or more sources, and accidents causing aggravation of pre-existing injuries, all of these being instances where the only alternatives to relieving the plaintiff of the normal burden of proof are to deny recovery altogether or to engage in purported allocations having no real basis in fact or logic. In the present case, by contrast, petitioner has until now always claimed to be able to make a rational apportionment of its losses to each of the defendants; and, as shown *infra*, there is no excuse for the absence of probative evidence definitely tracing the damage claim against Continental to the single pricing episode in issue.

[9] The suggestion that the Court of Appeals laid upon the petitioner an unduly difficult burden of proof on the damage issue is belied by the number of times that court has recognized and given effect to the modest standard of proof that emerges from this Court's decisions in the antitrust area. See Perryton Wholesale, Inc. v. Pioneer Distributing Co., 353 F.2d 618, 623 (10th Cir. 1965), *cert. denied*, 383 U.S. 945; Mechanical Contractors' Bid Depository v. Christiansen, 352 F.2d 817, 821 (10th Cir. 1965), *cert. denied*, 384 U.S. 918; Union Carbide & Carbon

In the case of Continental, the Court of Appeals said that petitioner's damage claim should be definitely tied to the alleged violation which occurred in June-July 1961. Petition, App. A, p. 49. Although this is the only point at which the court's opinion bears specifically upon petitioner's substantive burden of allocating damage, the Petition makes no mention of this and instead addresses itself to general but unspecified difficulties allegedly inherent in allocating damages among all the defendants. Petition, p. 33. The reason for this generalized form of attack upon the Court of Appeals' decision is obvious. There is simply no room for petitioner to claim any difficulty in attributing losses, if any, suffered by reason of Continental's price reduction to one or the other of the defendants. Continental alone among the defendants lowered its price in June-July 1961. Only Continental can be liable for any damages thereby incurred. The details pertaining to Continental's few sales are fully known, as are the details of petitioner's own sales. If, in spite of its record high sales volume during that period and its record profits for the year, petitioner claims damage as a result of lost sales to Safeway, or lower prices, or both, that claim can be calculated on a rational basis. No reason existed for the Court of Appeals to fre-

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Corp. v. Nisley, 300 F.2d 561, 595 (10th Cir. 1961), *cert. dismissed sub nom.* Wade v. Union Carbide & Carbon Corp., 371 U.S. 801; Atlas Bldg. Prods. Co. v. Diamond Block & Gravel Co., 269 F.2d 950, 958-59 (10th Cir. 1959), *cert. denied,* 363 U.S. 843; Kobe, Inc. v. Dempsey Pump Co., 198 F.2d 416, 426-27 (10th Cir. 1952), *cert. denied,* 344 U.S. 837. Indeed, in its brief filed in the Court of Appeals petitioner relied heavily upon the *Atlas Building* case, *supra,* as establishing the correct rule governing the quantum of proof (Appellee's Supplemental Brief on Remand, pp. 38-40) and the Court of Appeals in remanding for a new trial, cited *Atlas Building* as defining the standard applicable to petitioner "to meet its burden of proof." Petition, App. A, p. 48.

plaintiff from its burden of proving any damages it claims to have suffered in the summer of 1961 by reason of Continental's abortive attempt at reentry into the market.

CONCLUSION

Petitioner has demonstrated no cogent reason why this Court should intervene at this stage and prevent the case against Continental from being retried. The Court of Appeals is obliged, and should be permitted, to make just the careful review of the record that it did make. Its unanimous opinion is in no way inconsistent with this Court's review of the case against Continental. On the record made against Continental, the court below would have been entirely warranted in again ordering entry of final judgment against petitioner for failure of proof. It did not do so. No issue of public importance remains in the case. Certiorari should be denied.

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August 29, 1968